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HAROLD B. WILLEY, Clerk

No. 430

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

(Docket No. 22947)

ALLEGHANY CORPORATION, INVESTORS SYNDICATE OF AMERICA, INC., and INVESTORS DIVERSIFIED SERVICES, INC.,
Plaintiffs-Appellants,

—against—

JAMES FOUNDATION OF NEW YORK, INC.,
Defendant-Appellee.

PETITION OF APPELLANTS FOR REHEARING.

WHITE & CASE,
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UNITED STATES COURT OF APPEALS
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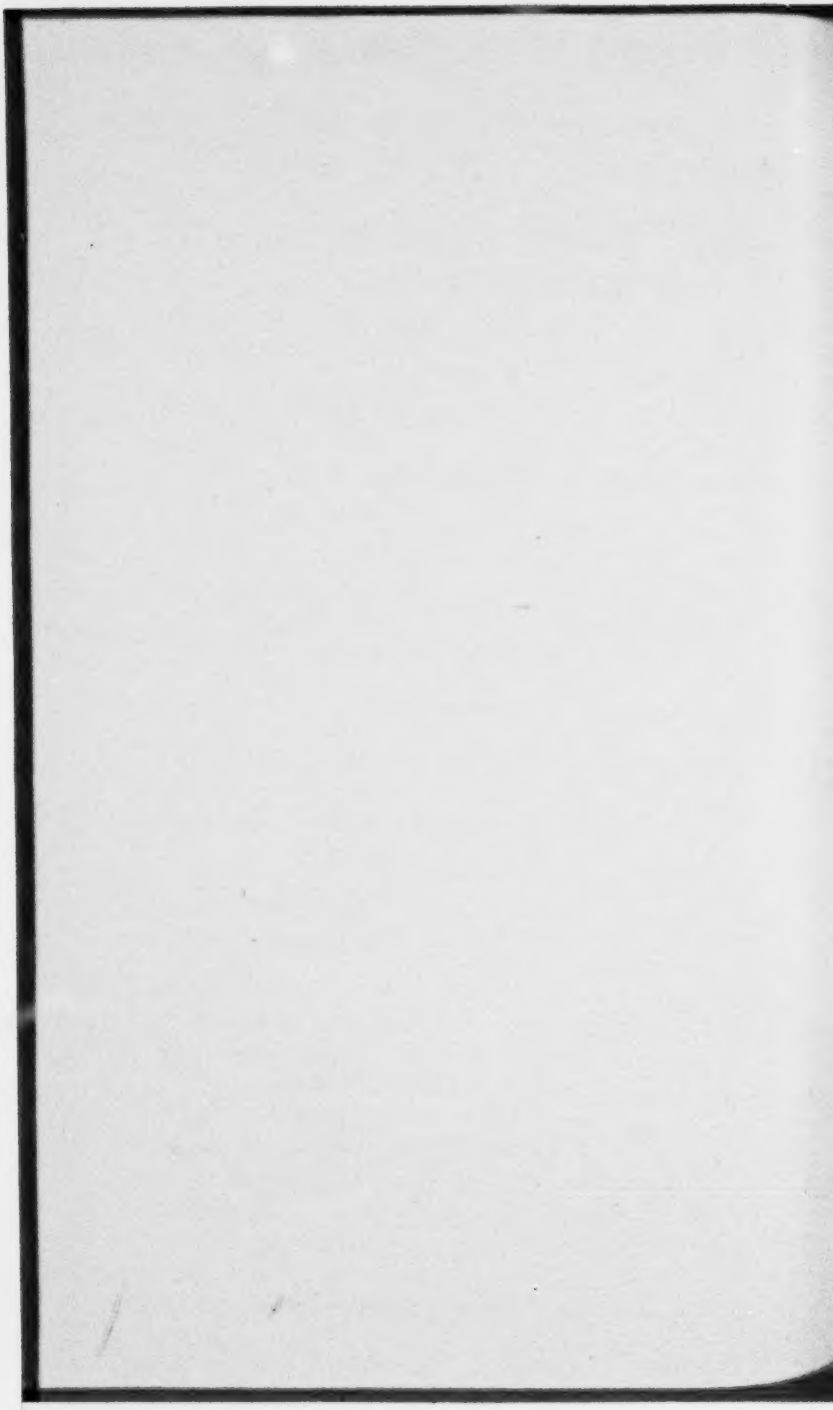

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Plaintiffs-Appellants,

—against—

JAMES FOUNDATION OF NEW YORK, INC.,

Defendant-Appellee.

PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FOR A REHEARING.

To the Honorable Judges, United States Court of Appeals for the Second Circuit:

The petition of Appellants respectfully shows:

I.

Summary Statement of the Matter Involved.

The appellants appealed from a judgment (11) of the United States District Court for the Southern District of New York after a trial without a jury in equity for specific performance of contracts for the sale in February 1951 by respondent to appellants and their assignors of 153,165 shares of the common stock and 55,727 shares of the preferred stock of Western Pacific Railroad Company. The judgment below dismissed the complaint upon the merits.

This Court in the decision entered in the Office of the Clerk on June 8, 1954 affirmed the judgment of the District Court. This Court assumed arguendo that contracts for the purchase

and sale of the stock were made by the parties. This Court held (ignoring the deed of trust [Pltfs.' Ex. 9] [3136]) that while Alleghany could validly contract for the purchase of the stock of James Foundation, Alleghany could not lawfully become owner of the stock within the required period (9 days) because the acquisition of title to the stock by Alleghany without prior approval of the Interstate Commerce Commission would violate § 5 of the Interstate Commerce Act. This Court ruled that the burden was on Alleghany to show that it could have procured the approval of the Interstate Commerce Commission in time.

Alleghany planned immediately on purchase to deposit the stock under the trust deed (Ex. 9) in accordance with the order of the Interstate Commerce Commission (Ex. 8) so to do. This order approved the trust agreement (Ex. 9) [3132] and directed compliance with it. The trust agreement contained the following provision:

> "(b) Alleghany Corporation and Chesapeake & Ohio each agrees that it will, promptly upon receipt thereof, assign, transfer and deliver to the Trustee hereunder all voting stocks of carriers subject to the Interstate Commerce Act which it may hereafter acquire, excepting stocks of carriers presently affiliated with the Chesapeake & Ohio, unless acquisition thereof is expressly approved by the Commission or unless the Commission shall otherwise order."

The "acquisition" is plainly not the purchase by Alleghany and transfer to the trustee. The "acquisition" is in the case where Alleghany would purchase stock and retain the stock without making any transfer to the trustee. Only here must Alleghany first have the approval of the Commission as we shall demonstrate.

The Interstate Commerce Commission ordered (3144) that "it shall be its (the trustee's) duty in respect of all of the shares of stock deposited hereunder, * * * *independently* to vote upon the election of directors at meetings of stockholders * * *." (Italics ours.)

Alleghany and any other depositor of stock were only entitled to voting trust certificates (3160). The order of the Interstate Commerce Commission contains no limit with respect to the quantity of the stock of any carrier purchased for deposit under the trust deed.

Unless the transaction here projected would have accomplished for Alleghany an acquisition of control of Western within the meaning of § 5 (2), the transaction would not be unlawful.

We must, therefore, assume that this Court has intended to hold that the projected transaction would have necessarily given Alleghany such control notwithstanding the deposit of the stock with the trustee.

II.

Reasons Relied On for the Allowance of Rehearing.

1. This Court misunderstood the order (Ex. 8) and the decision of the Interstate Commerce Commission (261 I. C. C. 239) as requiring prior approval by the Interstate Commerce Commission to deposit under the trust indenture (Ex. 9) an amount of stock of a carrier subject to the Interstate Commerce Act, which might constitute control of such a carrier.

2. This Court misunderstood the operation of the said trust indenture as determined by the Interstate Commerce Commission, in that this Court, contrary to the determination of the Interstate Commerce Commission appears to hold that the deposit of Western stock by Alleghany with the trustee under Exhibit 9 and the receipt by Alleghany of certificates of beneficial ownership without voting rights would constitute "future acquisitions of control by Alleghany."

3. This Court in the absence of a proceeding which complies with Sections 2321-2323, 28 U. S. C. A., has, we submit,

annulled in part the order of the Interstate Commerce Commission, Exhibit 8, wherein the Commission determined that the plan for the deposit by Alleghany of even a controlling block of stock of a carrier subject to the Interstate Commerce Act was consistent with the public interest. Under the above mentioned sections procedure to "annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money" must be brought by or against the United States, and the Interstate Commerce Commission, as of right, is entitled to be represented by its own counsel. This Court has, it is respectfully submitted, voided part of the order of the Interstate Commerce Commission, Exhibit 8, in a collateral proceeding violative of the said sections of the law of judicial procedure.

Discussion of Reasons.

The Interstate Commerce Commission in *Matter of Chesapeake & Ohio Railway Purchase*, 271 I. C. C. 5, at page 7, considered and decided the effect of the deposit under the very Exhibit 8 by the Chesapeake & Ohio of 400,000 shares of the common stock of the New York Central. The Commission states (p. 7):

> "Beneficial ownership to all this stock is now lodged in the Chesapeake & Ohio. * * * The Chesapeake & Ohio seeks release of the New York Central stock from the voting trust so that it may have the legal title to the stock and exercise the voting rights incident to such title."

On page 43 the Commission also says:

> "We find that modification of our order of June 5, 1945 [Ex. 8], so as to permit the Chesapeake & Ohio Railway Company to acquire legal title to and exercise full voting rights in, 400,000 shares of stock of the New York Central Railroad Company and to permit Robert R. Young and Robert J. Bowman to serve as directors of the New York Central while retaining

> their present position with the Chesapeake & Ohio would be tantamount to sanctioning a violation of section 5(4) of the Interstate Commerce Act and possibly section 7 of the Clayton Act."

It is clearly indicated that the Commission regarded the deposit of stock under Exhibits 8 and 9 as a transfer of ownership of the stock to the Chase Bank, as trustee, and as separating the depositor of the stock from "control" as comprehended by the Interstate Commerce Act, Section 5(4). The Commission held that the transfer to the trustee avoided a violation of Section 5(4). If the deposit of New York Central stock with the trustee had been regarded by the Commission as a "future acquisition" of control by Alleghany without approval in violation of the Act, the Commission could not have decided as it did. Furthermore the New York Central Railroad is an "unnamed" railroad which was not considered or discussed at the time Exhibits 8 and 9 were created.

There had been no specific approval by the Commission of the purchase or deposit of the New York Central stock under Exhibits 8 and 9 prior to trusteeing it. Reports of stock deposited were made quarterly to the Commission (1295, 3134) which learned in this way what was purchased and deposited. Exhibit 17 (3184) summarizes the reports for a time. In *Pere Marquette Railway Company Merger,* 267 I. C. C. 207, where the Commission passed upon the meaning of Exhibits 8 and 9, the Commission stated in a footnote (p. 252) that Alleghany

> "has reported to us, since the hearing herein that it had purchased 225,400 shares of the common stock of the New York Central Railroad Company; and that it had deposited 162,500 shares, and was about to deposit the remaining 62,900 shares, under the indenture * * * ; and later, that it had sold voting-trust certificates for 250,400 shares of this stock to the Chesapeake & Ohio."

In *Matter of Pere Marquette Railway Company Merger*, 267 I. C. C. 207, an independent director of Missouri Pacific Railway sought to compel Alleghany to deposit under Exhibits 8 and 9 the stock of Missouri Pacific owned by Alleghany amounting to 33.81% of the common stock (p. 252). In such proceeding Alleghany conceded that on consummation of the plan of reorganization then under consideration Alleghany should deposit the stock of the new company under Exhibits 8 and 9.

The Commission stated (p. 253):

> "The effect of the order in *Chesapeake & O. Ry. Co. Purchase, supra*, is to require the trusteeing of stock of the Missouri Pacific or any successor corporation that the Alleghany may receive in the reorganization of that company. In addition, the Alleghany has committed itself in this proceeding to deposit under the trust agreement any such stock so received by it. The trust agreement with the Chase National Bank, in that proceeding, *contemplates the further depositing of stock such as that here considered.*" (Emphasis supplied.)

Deposits under the trust agreement, under several rulings of the Commission, clearly deprived Alleghany of any control which could be enjoyed by ownership of the power to vote the stock. The public policy as fixed by these rulings is settled law and the Commission rule is not subject to collateral attack. The Commission has plenary power to determine the public interest. 49 U. S. C. A. § 5(11); *U. S. v. Pierce Auto Freight Lines*, 327 U. S. 515, 535-536 (1946); *McLean Trucking Co. v. U. S.*, 321 U. S. 67 (1944). After the deposit with the trustee of stock of another carrier in any amount Alleghany would only have control of the Chesapeake & Ohio and its affiliated companies, because control of the other carrier would be in the independent trustee. In all the above cases before the Commission it clearly has *determined* that the deposit of controlling stock with the trustee gives voting power to the trustee and no control to Alleghany.

We submit that the Commission also said exactly this in *Chesapeake & Ohio Railway Company Purchase*, 281 I. C. C. 229, as follows:

> "The affidavit of Young, which includes as an exhibit proposals signed by Kirby, with other exhibits embodies proposals by Alleghany made with a view to possible disposition of the proceedings in the two dockets 'without further litigation' and in lieu of exceptions to the original proposed report. It is the intention of Alleghany to acquire or dispose of securities of other corporations from time to time, including securities of carriers subject to regulation under the Interstate Commerce Act. It is, however, Alleghany's intention to limit its control of such carriers to the Chesapeake & Ohio and its affiliated carriers so long as such control continues and subject to the right of Alleghany to apply for control of such other carrier or carriers as it may consider to be in the public interest. In line with these policies Alleghany is prepared to accept an order in this proceeding authorizing continuance of its control of the Chesapeake & Ohio and its affiliated carriers, and containing the following conditions which shall be effective only so long as such control continues: (1) That Alleghany shall be subject to such provisions of the act mentioned in section 5(2) thereof as we shall deem appropriate and designate in our order thereunder; (2) that Alleghany and the Chesapeake & Ohio shall deposit their respective holdings of stock of The Pittston Company with the Empire Trust Company of New York as independent voting trustee; and (3) that Alleghany and the Chesapeake & Ohio shall deposit with the Chase National Bank of the city of New York as independent voting trustee all voting stocks of carrier corporations subject to regulation under the Interstate Commerce Act, not at present affiliated with the Chesapeake & Ohio system, whether now owned or hereafter acquired by either of them, except Alleghany's holdings of the stock of the Missouri Pacific Railroad Company which is now in reorganization under section 77 of the Bankruptcy Act, as amended." (p. 241)

* * * * *

(pp. 242-243) "The essence of the proposal is that Alleghany limit its control of carriers subject to regulations under the Interstate Commerce Act to the Chesapeake & Ohio, the Nickel Plate, the Pere Marquette and, subject to the existing voting trust, The Wheeling & Lake Erie Railway, together with other subsidiaries and affiliated carrier corporations already a part of the transportation system known generally as the Chesapeake & Ohio lines. Alleghany does not at present own stock of any carrier corporation outside this system except stocks of the Missouri Pacific Railroad Company. These would not be deposited since they do not represent any voice in the management of the Missouri Pacific properties. The only carrier corporation other than the Missouri Pacific, outside the Chesapeake & Ohio system, controlled by Alleghany is the United States Trucking Corporation (U. S. Trucking), all the outstanding stock of which is owned by Pittston. *By depositing in trust its holdings of Pittston stock, Alleghany would effectively divest itself of control of U. S. Trucking without sacrificing intrinsic values which at present inure to its own stockholders and without depriving minority Pittston stockholders of whatever rights they have incident to the control of U. S. Trucking by Pittston. Under its proposal, Alleghany would be committed to deposit in trust any voting stocks of carrier corporations not at present affiliated with the Chesapeake & Ohio which it may hereafter acquire. It would also be prevented from acquiring indirect control of other carriers, except with the approval of the Commission, through the Chesapeake & Ohio.* The proposed deposit by the Chesapeake & Ohio of its holdings of Pittston stocks and Erie stocks and the proposed agreement of the Chesapeake & Ohio to deposit in trust voting stocks of other carrier corporations outside its own system which it may hereafter acquire *without our authority*, are intended to accomplish this result." (Italics ours.)

Reference has been made by defendant and by the Court to the following quotation from page 261:

"We have given careful consideration to the proposal by Alleghany in its petition filed on April 12,

1945, and heretofore described more in detail, with respect to limiting its control of carriers subject to the act to only the Chesapeake & Ohio and its affiliated companies, unless further authorization be granted by us. We conclude that such restriction of control is desirable and shall impose conditions in this respect."

These conditions imposed by the Commission did not include any requirement that Alleghany have advance approval of the purchase of stock of a carrier for deposit under the trust. Nor did they limit the number of shares in any such purchase. These conditions were that trusts be established for the stock of Pittston Company and for the deposit of stocks acquired in the future by the Chesapeake & Ohio or Alleghany, the right to purchase which was recognized "without our authority" (p. 243).

A further condition imposed had reference to interlocking directorates.

The Commission also required that quarterly reports of the stock deposited with the trustee be made by the depositors (3134) and the Commission retained continuing jurisdiction over the depositors to act at any time with reference to the deed of trust.

By the above quotation the Commission did not mean that Alleghany would have control of a carrier whose stock was deposited with the trustee no matter what the amount of stock deposited and did not mean that Alleghany could not deposit even controlling stock with the trustee without first having the approval of the Commission. Exhibits 8 and 9 were not based on an application by Alleghany for approval of a specific purchase but for approval of the indenture in order that it might cover future purchases.

By the consummation of the contract, Alleghany would not have acquired "control" of Western Pacific within the meaning of the Interstate Commerce Act. While the block to be sold was large enough to give to its legal-title holder practical working control, amply justifying a decree for specific performance, the actual transfer of the common

stock would not have made Alleghany the "legal-title holder" and would have given it no "control" whatever within the meaning of the statute. The transfer would have been to the Chase Bank, an independent trustee, under the indenture existing between the Chase Bank and Alleghany, as specifically approved by the I. C. C. itself in *C. & O. Railway Co. Purchase,* 261 I. C. C. 239. The transfer would have been either by James direct to the Chase Bank, Trustee, or by a transfer by James to Alleghany accompanied by a *simultaneous* transfer by Alleghany to the Chase Bank, Trustee. By either process, Alleghany would never acquire the "control" of Western that would require the specific approval of the I. C. C. That "control" would have passed directly to the Chase Bank. What Alleghany would acquire would be the beneficial ownership as an investor—the interest of a *cestui que trust.* Alleghany did not contemplate acquiring, and the contract to sell did not provide that it should acquire, the "control" of Western Pacific without a new application to the I. C. C.

The Court was quite correct in holding that a contract will not be enforced if its performance will be an illegal act. But in the present case the performance would have been lawful. If a contract is capable of a lawful performance by one method, the fact that another method would have been unlawful does not invalidate the contract. The presumption is that the lawful method was intended; and on that basis the contract will be enforced.

It is matter of course that the I. C. C. in its order in 261 I. C. C. 239 did not give an "advance benediction of all Alleghany's future acquisitions of control." Obviously it could not without appropriate hearing approve in advance any "acquisition of control" by any carrier. But it did determine that purchases deposited under the indenture between Alleghany and the Chase Bank, even though they involved a block of stock that might give to its legal-title holder practical "control" would not violate Section 5(4) by giving Alleghany control of another carrier. By such a purchase,

Alleghany would not acquire that "control"; it would become merely a beneficial investor. If it should desire to acquire actual voting control, a subsequent application to the I. C. C. would be necessary.

Conclusion.

For the reasons stated above, petitioners request that a rehearing be granted and that on such rehearing the judgment of this court be reversed, and the judgment of the United States District Court be reversed and judgment entered in favor of petitioners, with a new trial ordered on the question of damages only.

Dated, June 23, 1954.

Respectfully submitted,

WHITE & CASE,
Attorneys for Appellants.

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ROBERT J. BULKLEY,
J. ADAM MURPHY,
MELVIN L. MILLIGAN II,
Of Counsel.

Certificate.

Alleghany Corporation, Investors Syndicate of America, Inc. and Investors Diversified Services, Inc., Appellants herein, by their attorneys, hereby certify that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

Dated, June 23, 1954.

WHITE & CASE,

By ORISON S. MARDEN,
A Partner,
Attorneys for Appellants.